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No. 00-231

Supreme Court, U.S.
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In the Supreme Court of the United States

HANDICOMP, INC.,
Petitioner,
v.
UNITED STATES GOLF ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the four-year statute of limitations bars Handicomp's claims for damages caused by acts that occurred more than four years before Handicomp filed suit.

2. Whether the court of appeals erred in affirming summary judgment on Handicomp's monopolization claim on the ground that Handicomp failed to present sufficient evidence of substantial barriers to entry.

3. Whether the court of appeals erred in affirming summary judgment on Handicomp's monopolization claim on the ground that Handicomp failed to present sufficient evidence "that USGA committed any anticompetitive or exclusionary acts."

4. Whether the judgment below is correct on the alternative ground (which the court of appeals did not address) that Handicomp failed to present sufficient evidence of antitrust injury.

Rule 29.6 Statement

Respondent United States Golf Association is a non-profit association of golf clubs and golf courses. It has no parent company, and no public company owns 10% or more of its stock.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

The unpublished decisions below involved the straightforward application of settled antitrust law to plaintiff's evidence. There is no split among the circuits. The petition for certiorari therefore should be denied.

STATEMENT

Respondent United States Golf Association ("USGA") is a non-profit association of golf clubs and golf courses. Among its other activities, the USGA promulgates the Rules of Golf and the USGA Handicap System, and conducts 13 annual golf championships (including the U.S. Open). A-1421-2.[1]

The USGA Handicap System is a set of rules and procedures for calculating a golfer's USGA Handicap Index ("handicap"). Handicaps, which are issued to golfers by golf clubs or golf associations, enable golfers of differing abilities to compete against each other. Handicap computation is a simple arithmetic process, involving application of a mathematical formula to a golfer's scores.

Handicomp and the USGA offer competing data processing services for computing golfers' handicaps. Handicomp has offered such a service since 1968; the USGA began offering its handicap computation service (known as Golf Handicap and Information Network ("GHIN")) in 1981. Pet. App. 2a-3a; 20a. Handicomp's complaint, which was filed on May 29, 1996, alleged that, "beginning at least in 1980," the USGA monopolized the market for "handicap computer software and services" in violation of § 2 of the Sherman Act. A-17.

After discovery, the district court granted summary judgment in favor of the USGA on four independent grounds,

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[1] "A-___" refers to the Appendix, and "SA-___" refers to the Supplemental Appendix, filed in the court of appeals.

each of which was sufficient to support the judgment. The district court held that (1) the statute of limitations barred Handicomp's claims for damages caused by acts that occurred before May 29, 1992 (Pet. App. 19a-22a); (2) Handicomp's evidence did not raise a genuine issue as to the existence of monopoly power (*id.* at 26a-29a); (3) Handicomp's evidence did not raise a genuine issue as to the USGA's alleged anti-competitive or exclusionary conduct (*id.* at 23a-24a n.4); and (4) Handicomp had not suffered antitrust injury (*id.* at 31a-36a).

A unanimous panel of the Third Circuit affirmed in a short, unpublished opinion. The panel affirmed each of the district court's first three holdings and did not reach the fourth.[2] The court, without dissent, denied rehearing and rehearing en banc.

Handicomp's certiorari petition asks this Court to grant review on all four issues, because the judgment below cannot be reversed unless Handicomp prevails on all of them. The following sections briefly review the facts, and the proceedings below, on each of the four issues that Handicomp has raised in the petition.

1. Statute of limitations. Handicomp's claim is based almost entirely upon events that occurred in the 1980s, more than four years before Handicomp filed its 1996 complaint. See Pet. App. 19a-22a. In fact, virtually all of the events described in the petition allegedly occurred in the 1980s.[3]

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[2] The petition states, erroneously, that the Third Circuit "held . . . that Handicomp had not demonstrated antitrust injury." Petition *i*, Questions Presented, no. 3. In fact, the Third Circuit did not even address the issue of antitrust injury.

[3] Handicomp indisputably knew of its alleged antitrust claims in the (continued...)

All of Handicomp's claimed damages allegedly were caused by the USGA's conduct in the 1980s. The petition admits that Handicomp "did not ascribe particular damages to" any of the USGA's challenged actions within the limitations period. Pet. *i* (Questions Presented, no. 4). Handicomp's opening brief in the court of appeals likewise stated (at 42) that "no particular damage could be attributed" to the USGA's conduct after May 29, 1992.

In May 1997, the magistrate judge ruled that documents created before 1990 generally were not relevant or discoverable, because Handicomp's claims for damages caused by events that occurred before May 29, 1992 are barred by the four-year statute of limitations. SA 49-50. Handicomp did not appeal that important ruling, which governed all discovery.

In February 1998, the USGA moved for an order *in limine* barring Handicomp "from introducing evidence of damages which Handicomp allegedly suffered as a result of acts that occurred before May 29, 1992 (four years before Handicomp filed this case)." SA-388. Handicomp's opposing brief was revealing, and dispositive, on this point. Handicomp's *only argument* on the statute of limitations issue was the entirely new

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[3] (...continued)
mid-1980s, more than ten years before it filed this action. A-1095-15-1095-21. A 1983 Handicomp memorandum discussed filing an antitrust "class action" against the USGA. James Healey dep., A-590-593. The minutes of a 1984 meeting of Handicomp's Board state that "the actions taken by the USGA to date would appear to reflect an intention to monopolize handicap computations throughout the country." A-1369. James Healey (Handicomp's founder and chairman) complained about GHIN's "monopoly" to the Federal Trade Commission in 1985, and to his congressman in 1989. A-902-03; A-1395-96.

contention that the statute of limitations was tolled by the USGA's alleged "fraudulent concealment" of facts purportedly supporting Handicomp's claims. SA-430-32. Handicomp *did not dispute* that, in the absence of fraudulent concealment, its claim for damages allegedly caused by pre-1992 conduct is time-barred, and evidence of those damages is inadmissible.

Handicomp then attempted to avoid the effect of the statute of limitations by moving for leave to amend the complaint to add allegations of fraudulent concealment. A-512-28. The magistrate judge denied that motion, and the district court affirmed, on three independent grounds: undue delay, prejudice, and futility. A-1073-93; SA-114-15, SA-156-57, SA-164-66.

After rejecting Handicomp's motion for leave to amend the complaint, the district court granted the USGA's motion *in limine* to bar evidence of damages that Handicomp allegedly suffered as a result of acts that occurred before May 29, 1992. The district court held:

> "Plaintiff cannot bootstrap any damages allegedly caused by these actions and any other actions taken by Defendant in the 1980s, or up to May 29, 1992 for that matter, by arguing that GHIN's presence in the market constitutes a continuing violation of Section 2 of the Sherman Act. This was made very clear in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), wherein the Supreme Court held that '[a]ntitrust law provides that, in the case of a continuing violation . . . each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again . . . . *But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.*'"

Pet. App. 21a (ellipses and emphasis added by the district court).

The court of appeals affirmed on this issue in a single paragraph, concluding that, "[b]ecause Handicomp may not recover damages for any acts that took place before May 29, 1992, the district court ruling was correct." Pet. App. 5a. Because Handicomp did not claim any other damages, this decision was dispositive of the entire case.

2. Monopoly power. Handicomp's monopolization claim has another fundamental flaw: the allegedly monopolized product market includes all computer software for computing golf handicaps,[4] and even Handicomp admits that "it is relatively easy to write a software program that can calculate a handicap." Pet. 17. Therefore, as both of the lower courts concluded, entry into the relevant market is easy. And as those courts held (and as Handicomp does not deny), ease of entry defeats a monopolization claim as a matter of law. Pet. App. 7a-8a; Pet. App. 25a-26a.

There is abundant evidence in the record that entry into the relevant market is easy, and that entry has occurred. Handicomp's president admitted that handicap computation software is "getting easier to write," and that "somebody could sit down in a matter of three weeks, develop a product and put it on the market that would compete." Stewart Healey dep., A-1161. One hundred different companies now offer such software in Florida alone. Hargis dep., SA-479. Handicomp's expert Curhan agreed that it is "not inordinately difficult" to create handicap computation software that will "satisfy [a golf] association." Curhan dep., A-1101. Curhan also admitted that

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[4] Such software is within the relevant product market defined in the complaint ("handicap computer software and services"), A-17, and Handicomp's expert witnesses and fact witnesses admitted that handicap computation software competes against GHIN's services. Hargis dep., SA-479; Haynie dep., A-1349-50; Deal dep., A-1219-21.

the time and expense involved in creating a marketable handicap computation system for golf associations is **not "a substantial barrier to entry** that affects competition in the market." *Id.*, A-1115 (emphasis added). Indeed, Handicomp's brief in the court of appeals stated that "Handicomp concedes that it is not relatively difficult to develop such software." Br. 47.[5]

Moreover, as the district court determined, there are many examples of new entry into the business of computing handicaps for golf associations. Pet. App. 27a-29a. These examples, and many others in the record, belie Handicomp's assertion (Pet. 18) that there has been no new entry since 1986.[6]

After the USGA moved for summary judgment, Handicomp had its experts submit certifications in which they opined that

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[5] Handicomp asserts repeatedly (*e.g.* Pet. 5, 9, 11, 13) that GHIN's service was overpriced and inferior to Handicomp's service, and that this "fact" was "acknowledged even by associations using GHIN" (Pet. 5). However, Handicomp cites only two isolated criticisms of GHIN (both from the Kentucky Golf Association, which renewed its GHIN contract in 1995 after competitive bidding that included presentations by five competing providers). Other evidence in the record, including customer surveys, established that "61% of GHIN users consider GHIN to be priced about right," "84% of GHIN clubs rate GHIN's overall service as either excellent or outstanding," and "GHIN users see GHIN software as being substantially better than competing services."A-362-63. Handicomp's experts did not dispute these facts. To the contrary, Handicomp's expert Deal acknowledged the relatively high level of customer satisfaction with GHIN as one reason why Handicomp was unable to expand its business. A-1217.

[6] For example, when the Southern California Golf Association solicited bids for its handicap computation service contract in 1990, it received thirteen bids — including *nine* bids from computer service companies that had never previously provided handicap computation services to golf associations. A-1262-82.

the USGA somehow had created "insurmountable barriers to entry." The district court rejected those certifications, holding that they "clearly contradict both experts' earlier deposition testimony." Pet. App. 35a n.8. Handicomp now relies heavily on the same certifications (*e.g.*, Pet. 4-5, 21 n.3), without informing the Court that the district court excluded that evidence.

The court of appeals affirmed the district court's conclusion that Handicomp had failed to prove substantial barriers to entry, which the court of appeals called the "*sine qua non*" of a monopolization case. The panel observed that:

> "Handicomp is unable to prove substantial barriers to entry because the astronomical reaches of computers and cyberspace form the backdrop of our new millennium. If not child's play, a skilled teen age hacker today would have no difficulty in programing a data processing system to register the rating slope of a golf course and the gross score of a golfer and produce a handicap. Handicomp's president admitted almost as much, stating that this software is 'getting easier' to write, and that 'somebody could sit down in a matter of three weeks, develop a product and put it on the market that would compete.'" Pet. App. 8a, quoting Stewart Healey deposition.

3. Anticompetitive conduct. As a third alternative basis for affirming the judgment, the court of appeals held that "there was insufficient evidence presented that USGA committed any anti-competitive or exclusionary acts." Pet. App. 9a. That conclusion aptly summarized years of litigation in which it became apparent that Handicomp had no evidence that the USGA ever did anything that reduced competition, excluded a competitor, or caused Handicomp to suffer antitrust injury.

Handicomp's liability experts, Curhan and Deal, candidly admitted that they could not identify any anticompetitive conduct by the USGA. Curhan testified as follows:

> "Q. Has the USGA done something to reduce competition in the market for handicap computation services that you have defined?
>
> A. Well, I've looked hard in what I have to find such evidence, obviously that is an assignment that I took on with the case. And I cannot come back to you with chapter and verse. . . .
>
> Q. [C]an you point to anything that the USGA did that hurt competition?
>
> A. No, I cannot point to it."

Curhan dep., A-1103-05.

Deal was similarly candid, admitting that the only anticompetitive conduct which he could identify is the USGA's "relationship" with GHIN — *i.e.*, the mere fact that GHIN is a service offered by the USGA. Deal dep., A-1208-09. Deal also admitted that the USGA has not done anything to create barriers to entry, "other than [to] have a relationship with GHIN." A-1206. Deal could not identify any situation in which the USGA used its rule-making authority to disadvantage its competitors. A-1206-07. And, as the Deal/Curhan expert report conceded, "[t]here is no evidence of associations being directly pressured or threatened by the USGA to select GHIN as their vendor." A-216.

Handicomp's principals and its expert witness Curhan also admitted that they could not identify anything that the USGA ever did that hurt Handicomp. For example, Curhan testified:

"Q. Do you know of anything that the USGA has done that hurt Handicomp?

A. No."

A-1108; see also A-1106-1107 (conceding that Curhan could not "point to any business that Handicomp lost as a result of anything that the USGA did"). Handicomp's principals made similar admissions. For example, Patricia Healey, who has been active in Handicomp's business for 30 years, testified:

"Q. Mrs. Healey, can you give me any example of anything the USGA ever did that hurt Handicomp?

A. I cannot."

A-1140. *Accord*, Lisa Healey Postma dep., A-1164 ("Q. Has Handicomp been damaged by anything the USGA has ever done? A. I have no personal knowledge on that").

Based in part on these admissions, and after a detailed review of Handicomp's evidence, the district court held that "Plaintiff cannot show that Defendant has engaged in anti-competitive or exclusionary conduct." Pet. App. 23a-24a n.4. The court held specifically that there is no evidence that the USGA's allegedly improper "manipulation of the rules of the game of golf" has "excluded Plaintiff from the association market or controlled prices in any fashion." *Id.* p. 31a. The court of appeals summarily affirmed on this issue. Pet. App. 9a.

4. Antitrust injury. The district court's fourth alternative basis for granting summary judgment was that Handicomp could not prove antitrust injury. Although the court of appeals did not reach this issue (because it had affirmed the judgment on three other grounds), Handicomp's damage theory demonstrates the fundamental failure of its antitrust claims.

From the outset, Handicomp's damage theory has been that it is entitled to recover the profits that it would have made "if GHIN didn't exist." Handicomp's Computation of Damages, A-198-15. Handicomp's damages expert, Upton, based his damage calculation on the sales that Handicomp "lost to GHIN," because of "competition from GHIN." *Id.*, A-1287-1288.

Handicomp also asserted that its profits were lower than they otherwise would have been because competition from GHIN forced Handicomp to charge lower prices. Handicomp's damage computation states, "If GHIN didn't exist, Handicomp prices would be 25% higher," and Handicomp computed its alleged damages on the basis of the revenue that it would have received if its prices had been 25% higher. A-198-15.

The district court held that Handicomp's claim that it would have been able to charge higher prices and earn higher profits if its competitor "didn't exist" does not constitute a claim of antitrust injury (Pet. App. 33a-34a):

> "In effect, Plaintiff is alleging that it lost profits because of GHIN's competition with it. This simply is not 'anti-trust injury' as the courts have defined it. . . . It is this Court's opinion that Plaintiff's damage claim is based upon 'loss from continued competition' with GHIN and to allow Plaintiff to recover damages for such competition would turn anti-trust law on its head to the detriment of the consumer."

REASONS FOR DENYING THE PETITION

This case does not raise any new, important or unsettled issue of federal law. On three of the four issues that Handicomp has raised in the petition (statute of limitations, anticompetitive conduct, and antitrust injury), Handicomp merely argues that the lower courts erred in applying admittedly settled law to the

evidence. Indeed, the petition states expressly that the law applicable to this case is clear from "a veritable laundry list of antitrust decisions issued by the Supreme Court, beginning with the *Standard Oil* case." Pet. 13. Therefore, there is no need for this Court to grant review in order to clarify the law.

On the remaining issue (the definition of barriers to entry), the asserted conflict between the Third Circuit and the Tenth Circuit is both illusory and immaterial to the outcome of this case. The Third Circuit did not — as the petition contends — adopt any restrictive definition of a barrier to entry; it merely affirmed the district court's fact-bound conclusion that Handicomp had failed to raise a genuine issue of material fact as to the existence of *any* barrier to entry. The USGA never argued for a narrow definition of a barrier to entry, and Handicomp never argued for a broad definition. In fact, Handicomp never previously cited the Tenth Circuit decision upon which it now relies (*Reazin* v. *Blue Cross and Blue Shield*, 899 F.2d 951 (10th Cir.), cert. denied, 497 U.S. 1005 (1990)) for the definition of a barrier to entry, because there was never an issue in this case regarding the definition of a barrier to entry. Thus there is no conflict between the unreported decision below and the Tenth Circuit's decision in *Reazin*. (See point 4 below).

Nor is there any conflict between the decision below and any decision of this Court. The decision below involved a straightforward application of settled law to fact, leading to an entirely predictable result.

1. One overarching reason to deny review in this case is that the decision below is supported by four independent grounds, each of which is sufficient to warrant affirmance of the judgment, but **none of which is necessary** to the result. Therefore, a decision to review and reverse the court of appeals on any one issue (or even two or three) would amount to an

advisory opinion, because the decision below would still be correct for the other reason(s) articulated by the courts below.

The clearest example is the statute of limitations issue. As discussed above (at p. 3-4), Handicomp admits that if the lower courts' application of the statute of limitations was correct, all of its claims are time-barred. The district court's statute of limitations decision was so clearly correct that it merited only a single paragraph in the court of appeals' opinion.

2. The statute of limitations ruling below was a straightforward application of this Court's recent decision in *Klehr v. A.O. Smith Corp.*, which explained how the antitrust statute of limitations applies to alleged continuing violations of the antitrust laws:

> "Antitrust law provides that, in the case of a 'continuing violation,' say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.' But **the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period."**

Klehr, 521 U.S. 179, 189 (1997) (citations omitted, emphasis added); see also *Rotella v. Wood*, 120 S. Ct. 1075, 1082-84 (2000) (emphasizing the public policy of "rewarding the swift" that underlies the Clayton Act's "accrual rule that 'generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business'").

The USGA's motion *in limine* asked the district court to exclude evidence of precisely the damages that *Klehr* held are barred by the statute of limitations – damages "caused by old overt acts outside the limitations period." The district court did not err by granting that motion *in limine*.

3. Handicomp's argument for review on the statute of limitations issue is based on a misrepresentation of what the courts below did. Handicomp asserts that "the courts below refused to consider all pre-May 29, 1992 evidence *for all purposes*." Pet. 25. In fact, no such order was ever entered, and the district court clearly did consider pre-May 29, 1992 evidence.

The USGA's motion *in limine* sought narrow, specific relief: the USGA requested an order *in limine* barring Handicomp "from introducing evidence of *damages* which Handicomp allegedly suffered as a result of acts that occurred before May 29, 1992." SA-388 (emphasis added). In granting that motion, the district court did **not** exclude all pre-1992 evidence:

> "It is . . . ORDERED that Defendant's *in Limine* Motion to Bar Evidence of Damages Which Handicomp, Inc. Allegedly Suffered as a Result of Acts That Occurred Before May 29, 1992 be and hereby is GRANTED."

Pet. App. 39a. The court of appeals emphasized that the district court excluded only evidence of *damages* caused by pre-May 29, 1992 conduct:

> "The USGA sought 'an order *in limine* barring plaintiff Handicomp . . . from introducing evidence of *damages* which Handicomp allegedly suffered as a result of acts that occurred before May 29, 1992 (four years before Handicomp filed this case).' Supp. App. at 388

> (emphasis added); *see* App. at 171. The district court granted the motion. App. at 2562-2563. Because Handicomp may not recover damages for any acts that took place before May 29, 1992, the district court ruling was correct."

Pet. App. 5a (emphasis added by the court of appeals).

The district court **expressly considered** pre-1992 evidence in ruling on the USGA's motion for summary judgment. For example, in assessing Handicomp's contentions regarding the USGA's alleged monopoly power, the district court expressly considered Handicomp's evidence and arguments regarding (1) the USGA's 1981 GHIN Feasibility Study, (2) the number of firms that offered handicap computation services in 1981; (3) the number of competitors that have entered the market "in the past 12 years," and (4) a 1991 USGA memorandum discussing the percentage of golf associations that used GHIN. Pet. App. 25a. Thus it is simply not true, as Handicomp asserts, Pet. 25, that the district court ruled that "all pre-May 29, 1992 evidence" is inadmissible "for all purposes."

4. Handicomp attempts to manufacture a conflict among the circuits by asserting that the court of appeals held "that the only relevant barrier to entry into the industry is the difficulty associated with creating the product or service." Pet. *i*, 16. However, the court of appeals did not so hold, and no issue relating to the definition of a legally cognizable barrier to entry was even briefed or argued in this case. Significantly, Handicomp has never previously cited the Tenth Circuit's *Reazin* decision on the issue of defining barriers to entry.[7]

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[7] Handicomp's brief in the court of appeals (at 45) cited *Reazin* (continued...)

The district court evaluated all of Handicomp's evidence, and concluded that Handicomp had failed to submit sufficient admissible evidence of barriers to entry to raise a triable issue. Handicomp's admissions that writing handicap computation software is easy and "getting easier," so that "somebody could sit down in a matter of three weeks, develop a product and put it on the market that would compete" (Stewart Healey dep., A-1161), clearly were an important factor in the district court's determination. Pet. App. 27a. Moreover, despite Handicomp's assertion to the contrary, the district court specifically held that "this Court need not rely solely upon this testimony in order to find that Plaintiff cannot establish that the barriers to entry . . . are significant." *Id.*

The district court went on to consider other evidence, including evidence that entry has occurred often, and that competitors (including Handicomp) have introduced new services and competed for new customers. *Id.* at 28a-29a. The district court also considered the certifications of Handicomp's experts regarding other alleged barriers to entry, but concluded that those certifications "clearly contradict both experts' earlier deposition testimony." *Id.* at 35a n.8.

Neither the district court nor the court of appeals excluded any evidence because of a narrow definition of barriers to entry. The lower courts simply held that Handicomp's evidence was insufficient to establish a triable issue with respect to the existence of *any* barriers to entry.

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[7] (...continued)
only for the limited proposition that in some cases market power may be inferred from a high market share. That point had nothing to do with the definition of a barrier to entry.

The Tenth Circuit's decision in *Reazin* is not inconsistent with the Third Circuit's unpublished opinion in this case. *Reazin* held that "substantial market power can persist only if there are significant and continuing barriers to entry." 899 F.2d at 968, quoting Areeda & Turner, *Antitrust Law* ¶ 505. The Third Circuit agrees. Pet. App. 7a-8a. The *Reazin* court listed examples of possible barriers to entry, including "high capital costs or regulatory or legal requirements such as patents or licenses." 899 F.2d at 968. The lower courts in this case never suggested that such market facts, if proven, would not constitute legally sufficient barriers to entry. The courts below simply held that Handicomp's evidence did not create a triable issue regarding the existence of *any* barrier to entry. That fact-based determination does not merit review by this Court.

5. Handicomp also challenges the court of appeals' holding that "there was insufficient evidence presented that USGA committed any anticompetitive or exclusionary acts" (Pet. App. 9a). However, Handicomp bases that challenge entirely on a vague assertion that the court of appeals should have applied "a heightened level of antitrust scrutiny." Pet. 13-14. Significantly, Handicomp never explains what the alleged "heightened" standard is, or how it should apply in this case. In any event, the cases upon which Handicomp relies — *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), and *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982) — do not support the assertion that any such "heightened" standard exists.

Neither *Allied Tube* nor *Hydrolevel* even mentions any special antitrust standard for determining the legality of a defendant's conduct. Indeed, the legality of conduct was not at issue before this Court in either case. Instead, those cases involved discrete issues that are not presented in this case —

Noerr-Pennington immunity (*Allied Tube*) and the liability of principals for the acts of their agents (*Hydrolevel*).

Allied Tube and *Hydrolevel* do not support, even by analogy, Handicomp's assertion that a "heightened" standard applies in cases where "an antitrust defendant . . . is the rule-maker/standard setter in an industry in which it competes." Pet. 15. Neither case involved such a situation. Instead, in both of those cases the "rulemaker" was a trade association which did not compete in the relevant market, but which promulgated standards that affected competition among its members. *Allied Tube*, 486 U.S. at 495; *Hydrolevel*, 456 U.S. at 559. In each of those cases, members of a trade association conspired in violation of § 1 of the Sherman Act to cause the trade association to issue rules that prohibited the use of a competitor's product. 486 U.S. at 496-97; 456 U.S. at 562-63.

Nothing of the sort occurred in this § 2 monopolization case. The USGA is not an association of competitors, and it did not issue rules that prohibited the use of Handicomp's product. As the district court specifically determined, Handicomp's evidence did not show that the USGA "manipulated the rules of the game of golf" in a way that injured Handicomp, or impaired competition. Pet. App. 31a. That fact-bound assessment of the record, which the court of appeals affirmed, disposed of Handicomp's claim that the USGA somehow abused its rulemaking authority.

6. Finally, the decisions below were correct for a reason that the court of appeals did not reach: Handicomp's own damage theory, and the testimony of Handicomp's own expert witness on damages, demonstrated that Handicomp had not suffered antitrust injury. Handicomp's damage claim was based exclusively on the theory that Handicomp would have made more sales, and could have charged higher prices, "if GHIN

didn't exist." A-198-15. As the district court correctly held, Handicomp "is alleging that it lost profits because of GHIN's competition with it. This simply is not 'anti-trust injury' as the courts have defined it." Pet. App. 33a.

This conclusion was compelled by controlling decisions of this Court. For example, in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484 (1977), the Court held that damages may not be awarded under the antitrust laws "where the sole injury alleged is that competitors were continued in business." *Brunswick* holds that injuries caused by competition are not compensable under the antitrust laws. 429 U.S. at 488. In *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 114-117 (1986), the Court held that "[t]he logic of *Brunswick* compels the conclusion that the threat of loss of profits due to possible price competition . . . does not constitute a threat of antitrust injury." And in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 337-38 (1990), the Court held that the plaintiff did not suffer antitrust injury when its competitor reduced prices, because "[a] firm complaining about the harm it suffers from nonpredatory price competition 'is really claiming that it [is] unable to raise prices.' This is not antitrust injury."

Handicomp's damage claim failed in the courts below for the same reason. As Judge Easterbrook has observed:

> "The claim that a practice reduces (particular) producers' incomes has nothing to do with the antitrust laws, which are designed to drive producers' prices down rather than up. Indeed, it does not even state an antitrust injury. . . . [T]he Sherman Act . . . is aimed at protecting consumers from high prices. Plaintiffs, who want to . . . charge higher prices, have pleaded themselves out of court on the antitrust claim."

SanJuan v. American Bd. of Psychiatry & Neurology, 40 F.3d 247, 251-52 (7th Cir. 1995) (citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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